

# NORTH DAKOTA DEFENDER

The Newsletter of the North Dakota Commission on Legal Counsel for Indigents

Spring 2009

Eleventh Edition

## The Commission

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## *A message from the Director . . .*

### POST CONVICTION PAINS

A criminal defendant has the right to seek relief from the district court after sentencing under our state Postconviction Act (§29-32.1). Some of the reasons a person might seek this relief is if there was a change in the law which may impact the conviction at hand, the sentence was not authorized by law, or the conviction is otherwise subject to some legitimate attack for certain errors. Postconviction relief is an important right given to criminal defendants and is one method to guard against wrongful conviction and sentencing.

Our agency hears many complaints from counsel about the representation of some defendants in postconviction relief matters. One complaint is about the filing of the petition itself. The court clerk is to notify an unrepresented applicant how to apply for counsel. It appears only persons that have filed a petition have a right to counsel. Sometimes, however, the Courts do allow the appointment of counsel to persons who haven't filed a petition yet but have indicated to the clerk that they wish to do so. The assigned attorney has to draft and file the petition. Many attorneys are conflicted ethically about having to draft and file a petition, because the defendant wants the attorney to do so, when the attorney can see no basis in the record, for the relief sought. Having the client first file a petition avoids this ethical dilemma for the attorney. If the applicant has filed a petition but missed a valid issue, the attorney can always file an amended petition if allowed to do so.

Another concern for counsel representing individuals in these cases is that some parties file multiple applications citing no new or valid issues. The attorney ends up arguing the same frivolous issue over and over again. Our agency looked at bringing legislation to modify the Act to provide for some sort of pre-screening of petitions, prior to the appointment of counsel. However, we felt that we needed a period of time in which to gather data. How many postconviction cases do our attorneys do in a year? Of those cases, how many of them involve multiple allegations of the same issue, and how many of them are, in the opinion of counsel, frivolous? We need that information before deciding to sponsor any sort of limiting legislation.

We are seeking the assistance of both contractors and full time attorneys with our agency to provide us this information. We will then decide, next legislative session, on which direction to take with this issue.

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## Upcoming Meetings and Events

April 19 - Commission meeting, Valley City  
(tentative, depending on legislative matters)  
June 9-12 - SBAND annual meeting,  
Ramkota, Bismarck  
June 24-25- Indigent Defense Seminar  
Best Western Kelly Inn, Fargo

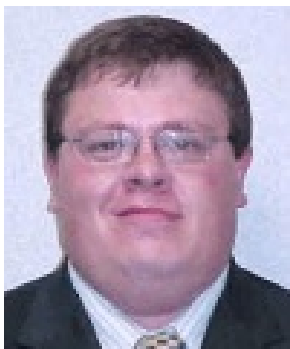
## Public Defender offices open in Bismarck and Fargo; New Employees

The Bismarck-Mandan Public Defender Office opened this past summer. It is located at 314 East Thayer, Ste. 200. The phone number is 701-328-7190. The office is staffed by attorneys Todd Schwarz, Travis Finck, and Robert Quick. Michelle Christie has been hired as the Legal Assistant. Vicki Becker is the Administrative Assistant. Ardyth Volesky works as a part-time secretary in the office. Jason Marino, served as the office's first summer intern.

**Todd A. Schwarz** is the Supervising Attorney in the Bismarck-Mandan Public Defender Office. He is a 1989 graduate of Hamline University of Law and a 1986 graduate of NDSU. Todd began his legal career under the supervision of Joseph A. Vogel, Jr. while still a law student. A majority of Todd's career has been dedicated to indigent criminal defense clients in both North Dakota state and federal courts, and prior to accepting a position in the office, held one of the South Central Indigent Defense contracts. He is licensed to practice law in North Dakota, Minnesota, North Dakota Federal District Court, Eight Circuit Court of Appeal and the United States Supreme Court. Todd is married to Michelle and has two children, Melinda and Jacob. Todd notes that he "works to support his fishing and aviation habits."



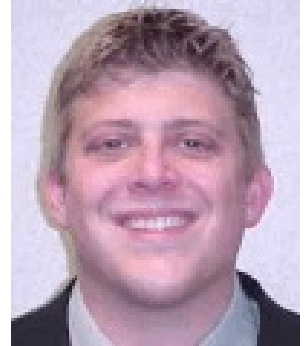
**Travis W. Finck** serves as a public defender in the Bismarck-Mandan office. Travis is a lifelong North Dakota resident. He attended the University of North Dakota at the undergraduate level and then proceeded to obtain his J.D. from the University of North Dakota



School of Law, with distinction. Travis was previously in private practice with the Rosenquist, Arnason & Hankey law firm in Grand Forks, ND, where he worked on the indigent defense contract. Travis is married to Diana Finck. They have no children as of yet, but are kept busy with their black lab named Ebony

and their cat, Jinx. In his spare time he enjoys time with his wife and the outdoors.

**Robert Nicholas Quick** also serves as a public defender in the Bismarck-Mandan office. He is originally from Fargo. He graduated from Fargo Oak Grove Lutheran High School and Gustavus Adolphus College in St. Peter, MN. During his junior year of college, he studied abroad in Lancaster, England for the spring semester. During his spring break, rather than returning home, he took the opportunity to backpack across Europe. After graduating from Gustavus, Robert attended the University of North Dakota School of Law, where he was involved in many activities including the UND-Norway Exchange Program, Moot Court, and Student Orientation Leaders. Robert was one of this agency's first interns, working in the Grand Forks Public Defender office during his third year of law school. During law school, he also clerked for Ross Brandborg in Fargo. After graduating, he worked at Galstad, Jensen, and Olson in East Grand Forks before accepting the Attorney I position at the Bismarck-Mandan Public Defender Office.

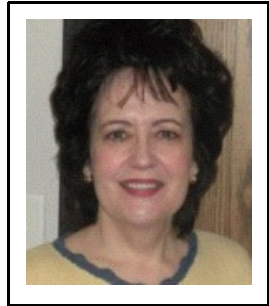


**Michelle Christie** began her position as the Legal Assistant in the Bismarck-Mandan office in October. She lives in New Salem with her husband, Clayton, and one-year-old daughter, Hailey. Michelle grew up in Glen Ullin with two older brothers and two sisters her age – she is an identical triplet! She went to college in Moorhead, MN, where she received her Bachelor's degree in Paralegal Studies.



**Vicki Becker** has joined the Bismarck-Mandan Public Defender Office as the Administrative Assistant II. She previously worked at Schwarz Law Office for several years, handling primarily indigent defense cases. Vicki was born in South Dakota and was raised

on a farm just outside of Pollock where she remained until after High School graduation and then moved to Bismarck to attend college. She still considers Pollock her home and visits quite frequently as many relatives still reside there. One of her High School teachers always told her she would marry a home-town boy and work on a farm. Her teacher was partially right, she did marry a home-town boy, but had no desire to try and make a living on a farm. Vicki and her husband, Mark, now live in the country, but have no farm animals only a run-way. Mark is a private pilot and enjoys flying the airplane he built.

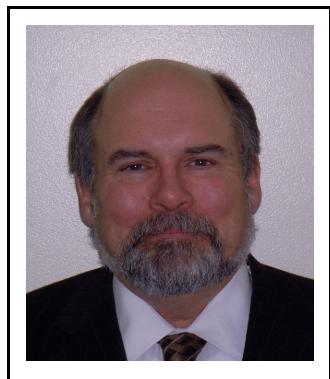


**Ardyth Volesky** works as a part-time secretary in the Bismarck-Mandan office. She was previously employed by the AG's office and retired in 2006 from the Burleigh County State's Attorney office where she had worked for over 25 years. She now finds it very interesting to work in the criminal justice system from the

opposing point of view. Ardyth is married to Dominic, who is retired from his divorce mediation business. They have one daughter, Karli, and three grand-daughters.

The Fargo Public Defender Office opened this past fall. It is located directly south of the courthouse, at 912 3rd Ave. S. The phone number is 701-298-4640. The office is staffed by attorneys Monty Mertz, Jomo Stewart, and Nicholas Thornton. Kathy Rodgers is the Administrative Assistant. Ashley Maki is the Legal Assistant.

**Monty Mertz** is the supervising attorney in the Fargo office. Monty was born in Bismarck and was raised in North Dakota, Nebraska, Montana and Wyoming, moving 16 times in 12 years due to his Dad's job with the



Army Corps of Engineers. He graduated from high school in Park River, ND, and attended UND on a four-year Army R.O.T.C. Scholarship. In 1978, He graduated with a B.S. in Social Work, with a concentration in Corrections. He also received a Commission as an Army Officer, and had

every intention of spending a career as an Infantry Officer, having received specialized training including Airborne School. Monty got side-tracked (engaged) and attended UND law on a delay from active duty. In law school, Monty worked for Central Legal Research and was the Case Comment Editor on the Law Review Board of Editors. Monty entered the Army JAGC after graduation in 1981. After schooling in Virginia, he was stationed at the III Armored Mobile Corps Headquarters at Ft. Hood, Texas. While at Ft. Hood, Monty was a Trial Counsel (prosecutor), Chief of the Legal Assistance Office, and Senior Defense Counsel. Monty left active duty after four years and moved back to North Dakota, settling in Fargo, in 1985. He stayed in the Army Reserves, in the Trial Defense Service, until 1999. From 1985 until 2008, Monty was in private practice, concentrating in civil litigation, family law, and criminal law. Monty was also a contract public defender from 1999 until taking his new position as the Supervising Attorney in the Fargo Public Defender Office in November. Monty and his wife, Paula, have been married over 30 years and have two children, Meagan and Taylor. Monty's hobbies and interests are centered in the outdoors, and include shooting, hunting, fishing, camping, hiking, canoeing in the Boundary Waters, and historical re-enacting in the Plainsmen Black Powder Club.

**Jomo Stewart** serves as a public defender in the Fargo office. Jomo was born in Los Angeles and was



raised in Orange County, California. After graduating from high school, he attended the United States Military Academy (West Point), where he played for the Army's football team. During his sophomore year, Jomo transferred to the University of San Diego. He later graduated from there with a B.A. in Psychology. He also attended the University of

San Diego School of Law. After graduation from law school, Jomo moved to San Francisco and specialized in Juvenile Dependency law and Criminal law. In San Francisco, Jomo met and married his wife, Michelle, who was born and raised in Bismarck. They have a young son, Jenar. In his free time, Jomo enjoys weightlifting, running, and watching sporting events. Jomo and Michelle also share a passion for travel, especially within Western Europe. Jomo has also worked as a certified personal trainer for the last ten years.

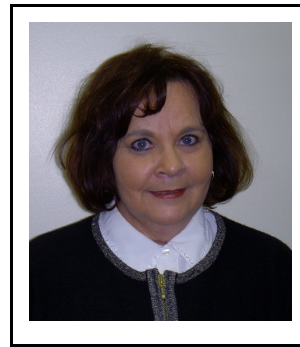


**Nicholas Thornton** joined the Fargo Public Defender office in November 2008. Before joining the office, Nick worked in private practice at the Serkland Law Firm in Fargo, where he practiced in criminal defense, business law, commercial transactions, banking law, and general litigation.



Nick also was a judicial law clerk to the Honorable Carol Ronning Kapsner at the North Dakota Supreme Court. In the fall 2008 semester, Nick was an adjunct professor at Minnesota State University Moorhead, where he taught upper-division criminal law. Nick received his undergraduate degree in criminal justice from Minnesota State University Moorhead and a Masters of Business Administration from the University of Mary. He obtained his law degree with distinction from the University of North Dakota School of Law, where he was elected to the Order of the Coif. While in law school, he served as President of the UND Criminal Law Association; as a Teaching Assistant for the first-year criminal law class, participated in Moot Court, and authored a book on the criminal justice system in North Dakota. Nick is originally from Jamestown, North Dakota. He and his wife have a two-year-old son. During their spare time, Nick and his family enjoy traveling, watching movies, and spending time outdoors.

**Ashley Maki** is the Legal Assistant in the Fargo office. She joined the Fargo Public Defenders office in December 2008. Previously, Ashley was working as a contract employee for Faegre and Benson, LLP, in Minneapolis, Minnesota. During the summer of 2008, Ashley completed a 12-week criminal defense internship with Valentini and Associates, The Law Office of Arthur Martinez and Rambow Law Firm. Ashley received her Bachelor of Science degree in Paralegal and Bachelor of Arts degree in Criminal Justice from Minnesota State University Moorhead. She received the Distinguished Members Award in 2007 from the Minnesota State Paralegal Association and was later elected as vice-president. Ashley is from Maple Grove, Minnesota. During her spare time, she enjoys shopping, traveling, and cheering on the Green Bay Packers.



**Kathy Rodgers** serves as the Administrative Assistant II in the Fargo Public Defender office. Prior to accepting the position, she had a wide range of experience working at the North Dakota Supreme Court, Burleigh County State's Attorney's Office and Mercer County Social

Services. Kathy obtained a secretarial certificate from Bismarck State College and has attended numerous administrative training sessions. She served on several committees while working at the Supreme Court. Kathy is originally from Washburn, North Dakota, and recently moved to Fargo, where her son and daughter-in-law reside. During her spare time, she enjoys quilting, reading, traveling, and collecting antique cobalt blue depression glass.

**Jenean Maroney** has joined the Minot Public Defender office as an Administrative Assistant III. Jenean



was raised in the Minot area and moved to New York following high school to work as a nanny. She then came back to North Dakota and attended MSU for legal secretary. She has worked for several Minot law firms and attorneys, including Ed Bosch, the Kenner firm, Richard Hagar, and the Ward County State's Attorney's office. She states that she

"loves defense work, this position opened and here I am!" Jenean is married and has one son.

## Commission Appointments and Farewells

Chairman **Bruce Quick** was reappointed to the Commission by SBAND. He was also re-elected Chair by his fellow Commissioners at the June meeting.

Commissioner **Ted Seibel** was reappointed to the Commission by Governor Hoeven. We are glad to have him with us until 2011.



Commissioner **Jennifer Hauge** was appointed to the Commission by Governor Hoeven. Commissioner Hauge is a graduate of UND School of Law. She previously clerked for the ND Supreme Court, and is the staff attorney for the Pattern Jury Instruction Committee.

Commissioner **Tom Ribb's** term on the Commission expired on July 31. He provided invaluable insight and direction (and a good dose of humor!) during the meetings. We wish him the best in his future endeavors.



Commission Chair Bruce Quick presents a clock to Tom Ribb in appreciation of his dedicated service to the Commission

## Reflections from an Intern . . .

As I reflect upon my experience this past summer as an intern at the Bismarck-Mandan Public Defender Office, I feel I must express my gratitude for the intense exposure I was granted to the criminal justice system. I am currently enrolled to begin courses as a 1L at the Indiana University School of Law this coming fall. I believe my time as an intern with the Public Defenders greatly prepared me for my first year of law school. From the outset of the internship I was permitted to observe hearings, read cases, and aid the attorneys in their interviews with clients. The experiences I gained this summer were educational as well as interesting but also very real. I believe I could not have gained the understanding I have of criminal defense by merely reading cases within a book. The experience with which

I have been provided this summer is invaluable. As I enter my first semester of law school the two primary skills I believe this internship has equipped me with are the ability to analyze and understand cases efficiently as well as articulate and compose oral and written arguments. I wish to thank the Commission on Legal Counsel for Indigents for affording me this experience and granting me this opportunity; I also would like to especially thank everyone in the Bismarck-Mandan Public Defender Office.

— Jason Marino



Bismarck-Mandan's first intern, Jason Marino, who is currently a 1L at the Indiana University School of Law

## FEATURED CONTRACTOR ... Ben Pulkrabek

Benjamin C. Pulkrabek is a sole practitioner whose office is located in Mandan, ND. He has practiced law for over 50 years!

Ben states that he "was born and raised in Brainerd, Minnesota. After high school my father demanded that I attend St. John's University at Collegeville, Minnesota. I reluctantly went to St. John's. The four years I spent there were the worst four years of my life. My life got much better when I started law school at Marquette in Milwaukee, Wisconsin. When you graduate from a Wisconsin Law School you are admitted to the Wisconsin Bar without having to take a bar exam. Despite this "free pass," I wanted to practice law in North Dakota, so I had to take the North Dakota Bar Exam.

I passed the bar in 1968 and started practicing law in Wahpeton, North Dakota with the law firm of Lewis &

Bullis. That firm dissolved when Hal Bullis was appointed U.S. Attorney for North Dakota. I then entered private practice with a couple of different law firms, and finally went to work for Legal Aid in Fargo.

In the early 1970's Kent Higgins was engaged in criminal defense work out of a federally funded Public Defender Office in Bismarck. He needed an assistant. I applied and was hired. Soon after, I was hooked and developed a passion for criminal defense work. In the 1970's I helped draft a plan for a statewide Public Defender System. It was presented to the North Dakota Legislature. The Legislature decided North Dakota didn't need a public defender system. When the Federal Public Defender office closed, I joined Joe Vogel's Law Firm in Mandan.

After Joe Vogel and I separated, I ran my own law office. I was joined by Tom Tuntland in the 1980's. In 1990, Tom Tuntland and I parted ways. I have been a sole practitioner since that time.

When the present Public Defender's Office opened, I saw an ad for an Appellate Attorney. I have always enjoyed appeals and arguing before the North Dakota Supreme Court. I applied and I got the job. In the past year I have won a criminal appeal and a juvenile appeal, for the Public Defender's Office, and I was also successful in a civil appeal from my private practice.

I have been practicing law in North Dakota for 40 years. The Public Defenders Office has now come full circle. It has asked me to write about some of the numerous experiences that I have had during my four decades of practicing law.

When I was a Public Defender, in the early 1970's, I had a client who was always getting involved in misdemeanor crimes. Each time he had to fill out an application to qualify for a Public Defender. One day this client appeared before the Court. The charge stated that he had taken a radio. The Judge decided he would speed up the application process and just ask questions instead of using the written application. The Judge started the questioning by asking my client if he had a job, money, owned any land or a car. To all these questions my client replied "no". The Judge then said "do you have anything?" The client replied, with a grin, "I have a radio." The Judge then recused himself.

Another story involves the first sentencing I ever attended in Grant County. After my client was given his rights and a factual basis was established for the crime,

the Judge said "Pulkrabek stand up". I did, and the Judge sentenced me to three years. My client then whispered to me and I whispered a reply. Then we both laughed. The Judge said this wasn't a laughing matter and you better have a good explanation or you will get more time.

I then explained I was the attorney. My client had asked me what he would get if I was sentenced to three years. My reply was that if I got three years for representing him, he would get a death sentence."

## **Update on Standards**

At its June 2008 meeting, the Commission adopted Minimum Attorney Performance Standards in Juvenile Unruly and Delinquency Matters, and Minimum Attorney Performance Standards in Juvenile Deprivation and Termination of Parental Rights Matters. At its September meeting, the Commission adopted Minimum Attorney Performance Standards in Appellate and Post-conviction Matters. At the December meeting, the Commission adopted a Business Code of Ethics and a Policy on Awarding Contracts for Professional Services. These and the Commission's other adopted Guidelines, Standards and Policies can be viewed on the Commission's website: ([www.nd.gov/indigents](http://www.nd.gov/indigents)). You may also contact the Valley City office at 701-845-8632 for copies.

## **BENCH AND BAR SEMINAR**

The Commission joined with SBAND, the State Judiciary, and the State's Attorney's Association for a joint Bench and Bar Seminar on September 11 and 12, 2008, in Bismarck. Sessions included training on the Dynamic Handling of Expert Witnesses; Evidence; DNA Analysis; Developments Relevant to Child Abuse, Domestic Violence and Elder Abuse Litigation; Psychological Evidence of Child Sexual Abuse; DUI Defense; and From Sentence to Discharge: What happens to a Defendant Sentenced to the DOCR? Training was also provided by Zeke Edwards of the Innocence Project of New York, on Issues with Eyewitness Identification. This training was provided at no cost to public defenders and indigent defense contractors, and was very well attended.

## **UPCOMING TRAINING**

The 2009 Indigent Defense Seminar is scheduled for July 23-24 in Fargo, at the Best Western Kelly Inn - please mark your calendar. We have tentatively



scheduled training on post-conviction and appellate issues, the ethics of closing your file, criminal law and legislative update, strategies for dealing with juvenile witnesses, and researching with Westlaw. If you have a topic you would like to present at the seminar, or one you would like to have covered, please contact Jean Delaney at [jedelaney@nd.gov](mailto:jedelaney@nd.gov), or by phone at 701-845-8632.

There will be no fee for public defenders, legal services attorneys, and contractors to attend this training. They will, however, need to register with SBAND to attend the meeting, once the registration form is finalized.

Additionally, the Commission will pay for lodging for public defenders and monthly contractors who would like to attend the training but live outside the Fargo area. A block of rooms has been reserved for the night of June 24 at the Best Western Kelly Inn. Please contact Tanya Meisch at 701-845-8632, no later than June 8, to reserve one of these rooms.

## **Heartbreak Hotel and the Fourth Amendment: A Motel Graphic**

– By Jon M. Sands and Shawdy Banihashemi

Americans are always on the move. The neon sign on life's highway beckons them, and along the way, they check into motels. For too many, their stay is disturbed by the knocking of police, or the snooping of desk clerks or the overly inquisitive maid service. You may be able to check-in to the NoTell Motel, but that does not mean somebody won't tell. Charges soon follow and not the type on a bill. To avoid Heartbreak Hotels, guests need to check out their Fourth Amendment rights along with the check-out time. Otherwise, they may be able to check-in, but never be able to leave.<sup>1</sup>

### **1. Motel Clerk — Regain Control**

*U.S. v. Hufhines*, 967 F.2d 314 (9th Cir. 1992) (innkeeper has authority to consent to search of room, but not defendant's belongings in room); *U.S. v. Singleton*, 922 F. Supp. 1522 (D. Kan. 1996) (“When occupancy period for a motel room elapses without tenant's payment for next day's rent, motel management regains control of room and may give consent to have room searched.”); *U.S. v. Murphy*, 516 F.3d 1117 (9th Cir. 2008) (owner of unit cannot give consent if guest has rented). See generally *Georgia v. Randolph*, 547 U.S. 103 (2006) (co-occupant cannot override consent refusal).

### **2. Guest Deliveries & Packages**

*U.S. v. Dunning*, 312 F.3d 528 (1st Cir. 2002) (general expectation of privacy for “letters and other sealed packages”); *U.S. v. Jackson*, 381 F.3d 984 (10th Cir. 2004) (“When the police already possess knowledge approaching certainty as to the contents of a container, the search of the container does not unreasonably infringe upon the individual interest in preserving the privacy of those contents.”).

### **3. Credit Card**

*U.S. v. Cunag*, 386 F.3d 888 (9th Cir. 2004) (where a hotel room is procured through fraud, defendant is not a “lawful occupant”); *U.S. v. Bautista*, 362 F.3d 584 (9th Cir. 2004) (lawful occupants allowed Fourth Amendment protection where stolen credit card number used for reservation because hotel did not take affirmative steps to repossess the room).

### **4. Overstaying Guest**

*U.S. v. Dorais*, 241 F.3d 1124 (9th Cir. 2001) (overstaying guests have a reasonable expectation of privacy for the additional amount of time they request to remain in the room so long as management approves and the hotel has placed the guest on notice); *U.S. v. Singleton*, 922 F. Supp. 1522 (D. Kan. 1996) (even if holdover tenant in motel room may have property interest in items still found in room, tenant does not have reasonable expectation of privacy protected by Fourth Amendment after rental period terminates).

### **5. Rental/Stolen Car**

*U.S. v. Thomas*, 447 F.3d 1191 (9th Cir. 2006) (unauthorized driver of stolen rental car has no expectation of privacy and no standing to challenge a search, but may have standing to challenge search if driver has permission to operate vehicle); *U.S. v. Cormier*, 220 F.3d 1103 (9th Cir. 2000) (no expectation of privacy because no ownership or possessory interest).

### **6. Rental Car Holdover**

*U.S. v. Cooper*, 133 F.3d 1394 (11th Cir. 1998) (violation of a rental car agreement by failure to return the car in a timely fashion did not eliminate a defendant's reasonable expectation of privacy); *U.S. v. Henderson*, 241 F.3d 638 (9th Cir. 2001) (reasonable expectation of privacy where lease had expired with understanding that

lessee would extend rental and retain possession and control over car).

## **7. Parking Lot**

*U.S. v. Diaz*, 25 F.3d 392 (6th Cir. 1994) (although defendant may have a reasonable expectation of privacy in his or her motel room or car, such privacy does not extend to a parking lot where “officers could lawfully enter”); *U.S. v. Ludwig*, 10 F.3d 1523 (10th Cir. 1994) (neither defendant, resident of motel, or even motel owner had legitimate expectation of privacy in motel’s parking lot, and thus, police officer’s entry of motel parking lot with dog for canine sniff of vehicles parked in lot was not “search” under Fourth Amendment, where parking lot was open and visible from public roads bordering it and was not fenced, no gate prevented unauthorized entry, and no signs restricted entry to parking lot).

## **8. Search Zone Within Hotel Room**

*Stoner v. California*, 376 U.S. 483 (1964) (well-settled that a lawfully occupying hotel patron enjoys Fourth Amendment protection); *U.S. v. Dorais*, 241 F.3d 1124 (9th Cir. 2001) (right to privacy continues up until hotel takes steps to repossess the room); *Rakas v. Illinois*, 439 U.S. 128 (1978) (if not legitimately on premises, no reasonable expectation of privacy); *Chimel v. California*, 395 U.S. 752 (1969) (“Once defendants had been lawfully arrested, [officer] was entitled to search areas within their immediate control to insure the officers’ safety and to prevent the destruction of evidence.”); *U.S. v. Rollins*, 190 Fed.Appx. 739 (10th Cir. 2006) (because [defendant] was in one part of the room does not exclude other parts of the room from the search). *But see U.S. v. Albrektsen*, 151 F.3d 951 (9th Cir. 1998) (police not permitted to pass threshold of hotel room to serve misdemeanor warrant).

## **9. Hotel Bathroom**

*U.S. v. Moran Vargas*, 376 F.3d 112 (2nd Cir. 2004) (warrantless search of bathroom illegal under protective sweep doctrine where police did not offer sufficient facts that would warrant a “reasonably prudent officer to believe that an individual posing a danger to the agents was hiding in the bathroom”).

## **10. Bed**

*Coolidge v. New Hampshire*, 403 U.S. 443, 464 (1971) (weapon “protruding” from underneath bed justified seizure of handgun under plain view doctrine); *U.S. v. Lueth*, 101 Fed.Appx. 231 (9th Cir. 2004) (“search

under hotel bed’s box spring did not exceed the scope of consensual search, where one of the deputies told defendant that defendant was suspected of drug activities and defendant should have understood that consent to search included looking under the box spring, a common hiding place for drugs”).

## **11. Dresser**

*U.S. v. Gravier*, 532 F. Supp. 876 (D.C. Ohio 1982), *aff’d*, 706 F.2d 174 (6th Cir. 1983) (no Fourth Amendment violation where accidental discovery of cocaine in dresser drawer and search was conducted incident to lawful arrest).

## **12. Towels**

*State v. Kruger*, 2002 WL 570322 (Ohio Ct. App. 2002) (finding a blood-soaked towel in defendant’s possession when he opens the door to his hotel room does not give police a right to conduct a valid warrantless search of the hotel room as the search fails to fall into any of the exceptions for a warrantless search).

## **13. Luggage**

*U.S. v. Bennett*, 908 F.2d 189 (7th Cir. 1990) (searching luggage allowed under the “search incident to arrest exception to the warrant requirement”); *Evans v. U.S.*, 382 F.2d 739 (9th Cir. 1967) (valid search of luggage where defendant consented to search of motel room).

## **14. Snooping Maid & Refusal of Maid**

*U.S. v. Johnstone*, 574 F.2d 1269 (5th Cir. 1978) (no probable cause for warrantless search where defendant refused maid service during stay at motel); *U.S. v. Costa*, 356 F. Supp. 606 (D. D.C. 1973), *aff’d*, 479 F.2d 921 (D.C. Cir. 1973) (invalid warrantless search where maid discovered narcotics in room, notified manager and manager consented to police search because guest still lawful occupant of room); *U.S. v. Sherry*, 906 F. Supp. 1311 (D. Neb. 1995) (maid’s observation of incriminating items and unusual behavior by occupants coupled with unusual rental pattern, paraphernalia in plain view and on occupant’s person supports “a finding of probable cause for a search warrant”).

## **15. Loud Noise/ Eavesdropping**

*U.S. v. Rivera*, 825 F.2d 152 (7th Cir. 1987) (exigent circumstances sufficient to allow warrantless entry into hotel room with “Do Not Disturb” sign on door



and sounds of television or radio emanating); *U.S. v. Rohrig*, 98 F.3d 1506 (6th Cir. 1996) (police officers' warrantless entry into defendant's home in middle of night to turn down loud music that was disturbing neighbors, after unsuccessful attempts to contact occupant, was justified by exigent circumstances); *U.S. v. Llanes*, 398 F.2d 880 (2nd Cir. 1968) (an individual who speaks in a tone audible to a person outside his door does not have a reasonable expectation of privacy); *U.S. v. Agapito*, 620 F.2d 324 (2nd Cir. 1980) (DEA agents who eavesdrop on conversations by pressing their ears to the door do not violate the Fourth Amendment).

#### **16. Suspect Consent & Suspicion**

*U.S. v. Crapser*, 472 F.3d 1141 (9th Cir. 2007) ("mere reasonable suspicion" sufficient to search suspect's belongings in motel room where suspect's consent given); *Georgia v. Randolph*, 547 U.S. 103 (2006) ("Warrantless search of marital residence, on basis of consent given to police by defendant's wife, was unreasonable and invalid as to defendant, who was physically present and expressly refused to consent.").

#### **17. Guest Is Still a Guest: No Consent**

*Stoner v. California*, 376 U.S. 483 (1964) ("Fourth Amendment protected hotel guest from use of evidence seized under a 'consent' to search his hotel room given by the desk clerk.").

#### **18. Plain View — Access/Character**

*U.S. v. Wells*, 98 F.3d 808 (4th Cir. 1996) ("A warrantless seizure is justified under the plain view doctrine if the officer has a legal right to be in the place from where he sees the object subject to seizure and a 'lawful right of access to the object itself,' and if the object's incriminating nature is 'immediately apparent'."); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (seizure is legitimate under an exception to the warrant requirement "where it brings police within plain view of [an] article of incriminating character").

#### **19. Duration — Expectation of Privacy**

*Minnesota v. Olson*, 495 U.S. 91 (1990) (a person is legitimately on premises if society is prepared to recognize the presence as reasonable); *U.S. v. Hufhines*, 967 F.2d 314 (9th Cir. 1992) (where rental period expires and hotel has taken "affirmative steps" to repossess room, defendant does not have reasonable expectation of privacy in room).

#### **20. Outside/Hallway of Room**

*U.S. v. Crapser*, 472 F.3d 1141 (9th Cir. 2007) (where defendant voluntarily leaves confines of motel room, he "surrenders his heightened expectation of privacy," and corresponding Fourth Amendment protections); *U.S. v. Cormier*, 220 F.3d 1103 (9th Cir. 2000) (voluntary opening of motel room was a consensual encounter).

#### **21. Abandoned Room**

*U.S. v. Croft*, 429 F.2d 884 (10th Cir. 1970) (guest completely loses any privacy associated with a hotel room when the rental period has expired); *U.S. v. Parizo*, 514 F.2d 52 (2nd Cir. 1975) (relinquish right of privacy and occupancy when voluntarily abandon room); *U.S. v. Bautista*, 362 F.3d 584 (9th Cir. 2004) (failure to leave luggage constitutes abandonment of hotel room which discontinues a reasonable expectation of privacy).

#### **22. Wrong Room**

*U.S. v. Furlong*, 844 F. Supp. 624 (D. Mont. 1994), *aff'd in part, rev'd in part* 61 F.3d 913 (9th Cir. 1995) (warrant for motel room that contained wrong room number on its face, but correct motel and correct street address, was sufficiently particular to permit search of correct room).

#### **23. Unregistered Guest**

*U.S. v. Deninno*, 29 F.3d 572 (10th Cir. 1994) (defendant who was not the registered occupant of the room "does not have standing to challenge the search of a motel room").

#### **24. Neighborhood Vehicle Search**

*U.S. v. Hernandez-Alvarado*, 891 F.2d 1414 (9th Cir. 1989) (Fourth Amendment does not allow random vehicle search in a neighborhood because some of the residents are known criminals).

#### **25. Fourth Amendment Hotel Protection**

*Stoner v. California*, 376 U.S. 483 (1964) (Fourth Amendment protects hotel patron); *U.S. v. Bautista*, 362 F.3d 584 (9th Cir. 1994) (Fourth Amendment protection extends to hotel or motel room).

## 26. Restitution

*U.S. v. Brock-Davis*, 504 F.3d 991 (9th Cir. 2007) (restitution proper to clean up motel room after criminal activity (meth) created mess; restitution not proper for lost income and asbestos test).

**Note 1.** See The Eagles, *Hotel California* (Asylum Records 1977) (“You can check-out anytime you like, but you can never leave.”). *Hotel California* describes a weary traveler, who resembles many of our clients, who becomes trapped in a nightmarish hotel that initially appears to be inviting and tempting. The song is about the dark underbelly of the American dream, and depicts excessive “life in the fast lane.” *Hotel California* was ranked No. 49 on the Rolling Stone’s list of the greatest rock-and-roll songs. See Wikipedia, *Hotel California* (song), [http://en.wikipedia.org/wiki/Hotel\\_California](http://en.wikipedia.org/wiki/Hotel_California) (song), visited on Aug. 7, 2008. See also Elvis Presley, *Heartbreak Hotel* (RCA Records 1956) (“Well, since my baby left me/ Well, I found a new place to dwell/ Well, it's down at the end of lonely street/ At Heartbreak Hotel.”). For a history of hotels in American life and culture, see generally A. K. Sandoval-Strausz, *Hotel: An American History* (2007).

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## Assorted Odds and Ends

***What if your incarcerated client wants to appear at appellate oral argument?***

Pursuant to ND Supreme Court policy, to obtain the presence of an incarcerated defendant at appellate argument, an affidavit must be submitted to the Clerk of the Supreme Court, at least eight days prior to the time set for oral argument, presenting “convincing evidence” of “the need for the defendant’s presence and how it will promote the ends of justice.”

***Who pays for fact witnesses in juvenile court?***

Witness fees for fact witnesses in matters brought under the Juvenile Court Act are paid by the Attorney General, pursuant to NDCC § 27-20-49 (2). The request for payment of fees should be made on the AG’s form, (<http://www.ag.nd.gov/FinAdmin/sfn52850.pdf>), not on the Commission’s witness form, and submitted to the Attorney General’s office for payment.

***What should I do if my criminal defense client wants to appeal?***

It is not necessary for a criminal defendant who was represented by indigent defense counsel at the trial level to reapply for counsel for an appeal. If the client wishes to appeal, the trial counsel should file the notice of appeal and order necessary transcripts. If trial counsel is a public defender or contract attorney, counsel will remain the attorney on the appeal, but should close out the criminal case assignment on the case reporting system and open a new assignment under case type “appeal.” If the attorney feels, for some reason, that he or she cannot handle the appeal, the attorney should still file the notice of appeal and order necessary transcripts so no deadlines are missed. The attorney then can submit a request to the Commission to have the appeal assigned to an appellate attorney. The request to assign case to appellate counsel form can be found on the Commission’s website, at [www.nd.gov/indigents/docs/appellateRequest.pdf](http://www.nd.gov/indigents/docs/appellateRequest.pdf).

## Thank you

On many occasions, the Commission receives requests from contractors and public defenders for help with research issues, finding experts, sample forms, and suggestions for handling situations. If requested, we forward these requests to our contractors and public defenders, asking if they can provide assistance. We have received many positive comments from all involved. Thank you to the many (too many to name) contractors and public defenders who respond to these requests for assistance.

## Good and/or Interesting Sources . . .

- The Commission’s standards, policies, and forms can be found on our website at [www.nd.gov/indigents](http://www.nd.gov/indigents).
- The Department of Corrections and Rehabilitation has updated its website. Included in the updates are listing and descriptions of services available to inmates at the various sites: <http://www.nd.gov/docr/programs/inmates.html>. The DOCR has also posted an inmate sentence calculator. The calculator can be found at: <http://www.nd.gov/docr/media/timedone.asp>.
- The Commission offers Westlaw to its public

defenders and contractors. Access Westlaw at [www.westlaw.com](http://www.westlaw.com). Contact Donald Rasinen at [donald.rasinen@thomsonreuters.com](mailto:donald.rasinen@thomsonreuters.com) (the Commission's designated attorney trainer) for assistance.

- The President's DNA Initiative provides free, self-paced online courses to help criminal justice professionals. See what is offered at [www.dna.gov](http://www.dna.gov).
- The North Dakota Supreme Court website includes a page where the public can search North Dakota District Court case information for criminal, traffic and civil cases, and to view the district court calendars. Look at [http://www.ndcourts.gov/publicsearch/contacts\\_earch.aspx](http://www.ndcourts.gov/publicsearch/contacts_earch.aspx).
- Information about and from the ABA's Children's Rights Litigation Committee: <http://www.abanet.org/litigation/committees/childrights/>. Order a copy of the DVD "Interviewing the Child Client - Approaches and Techniques for a Successful Interview" and view other training materials.
- The Federal Office of Defender Services offers free training materials and other publications. Check out the website here: [http://www.fd.org/odstb\\_publications.htm](http://www.fd.org/odstb_publications.htm).

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